IN THE SUPREME COURT OF MISSOURI

NO. SC86741

FURLONG COMPANIES, INC,
RESPONDENT,

vs.

CITY OF KANSAS CITY, MISSOURI,
APPELLANT.

CASE NO. 00CV210725
WD63248

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
DIVISION NO. 4
HONORABLE JUSTINE E. DEL MURO, CIRCUIT JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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II. JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered by the court in a cause heard without a jury. On July 25, 2003, a final judgment order was entered against Appellant City of Kansas City, Missouri. (L.F. 51-63). On August 27, 2003, the City timely filed its Notice of Appeal. (L.F. 48-50). On February 22, 2005, the Court of Appeals issued its order and opinion. On March 29, 2005, the Court of Appeals denied Respondent Furlong Companies, Inc.'s Motion for Rehearing and Application for Transfer. On May 31, 2005, this Court granted Furlong's Motion for Transfer. The Supreme Court has jurisdiction pursuant to Article 5, Section 3 of the Constitution of Missouri and Supreme Court Rule 83.04.

III. STATEMENT OF FACTS

On October 1, 1999, Appellant City of Kansas City, Missouri, respondent-defendant below ("City"), through its City Development Department, received an application for approval of a preliminary plat from Respondent Furlong Companies, Inc., relator-plaintiff below ("Furlong"). (L.F. 9, 15-21; J.S[1]. par. 6).

City staff recommended approval of the plat application subject to certain conditions, one of which was that a revised preliminary plat should be submitted prior to an ordinance request showing certain recommended changes. (J.S., Par. 18). Those changes were to eliminate the easterly drive, waiver of the 3 to 1 lot ratio requirement and the submission of a revised plat. (J.S. Par. 18). Furlong did not file a revised preliminary plat or eliminate the easterly drive as requested by city staff. (Tr. p 131, l. 23- p. 132, l. 14).

Kansas City Ordinance Chapter 66, §2(b)(7) of the subdivision Regulations

[1]Joint Stipulation agreed to by the parties in the trial court.

requires the Council to determine when it is considering the approval of a preliminary plat the effect of the proposed subdivision of land on ". . . the circulation of traffic throughout the city, having particular regard to the avoidance of excessive congestion in the streets and highways and the provision of safe and convenient vehicular and pedestrian traffic movements appropriate to the various uses of land and buildings . . . ." (J.S. Ex. "E").

Kansas City Ordinance Chapter 66, §81(a)(2) of the Subdivision Regulations requires that all subdivision plats comply with the City's "zoning ordinance and building . . . codes . . . ." (J.S. Ex. "E"). Kansas City Ordinance Chapter 66 §81(b) specifically provides that plat approval may be withheld if a proposed subdivision is not in conformity with any of the laws, rules and regulations listed in §66-81(a). (J.S. Ex. "E").

On December 7, 1999, the City Plan Commission ("Commission") conducted a hearing to determine the Preliminary Plat's compliance with the Subdivision Regulations. (J.S. par. 16-17). The Commission allows the opportunity for those in support of and against the application to speak out. (Chapter 66, §42 (d)(1), 66-44; J.S. Ex. K, Commission transcript p. 137-142). Neighbors voiced their opposition to the application, which was based on increased noise and traffic. (J.S. K, p. 143-150). The Commission voted 6-0 against the application. (J.S. Ex. "K" p. 156-157).

On January 7, 2000, Furlong requested that its application be submitted to the full City Council ("Council"). (J.S. par. 21 and J.S. Ex. "L"). Under Kansas City Ordinance Chapter 66, §42(d)(1), the Council has the authority to approve preliminary plat applications. (J.S. Ex. "E").

On February 3, 2000, proposed Ordinance No. 000144 was introduced to the Council. (J.S. par. 23 and J.S. Ex. "O").

The Council's Planning Zoning and Economic Development Committee

("Committee") is the committee that reviews preliminary plat ordinance requests. (Tr. p. 745, l. 9- p. 746, l. 24). On March 1, 8, 15 and 22, the Committee conducted meetings on Furlong's ordinance. (City's Exhibits 30-33). The Committee heard from neighbors opposing approval of the application because of concerns of increased noise and traffic. (City's Exhibits 30-33). In reviewing the request, the Committee had the fact sheet, staff report and the Commission 6-0 vote against the application. (Tr. p. 746, l. 7- p. 748, l. 25; L. F. 29). The Committee is a recommending committee to the full Council. (Tr. p. 750, l. 11-13).

Councilman Ford testified prior to voting on an ordinance on a preliminary plat application, all City Council members receive an Ordinance Fact Sheet. (Tr. p. 803, l. 10-22; J.S. Ex. "O"). The Fact Sheet stated that the application was to allow for the subdivision of 2.76 acres into three (3) lots, one containing a car wash and the other two (2) lots intended for restaurants. (J.S. Ex. "O"). The Fact Sheet stated what was already there, a Kentucky Fried Chicken/Taco Bell, Red Bridge Shopping Center to the South, Building of an eight bay carwash had commenced, Amoco gas station and Somerset Bank. (J.S. Ex. "O"). The Fact Sheet stated that the Center Planning & Development Council opposed the application because the proposed uses were too intensive for site, and there would be increased traffic and noise. (J.S. Ex. "O"). The Fact Sheet also stated that the Commission voted 6-0 against the application. (J.S. Ex. "O"). The staff report requested that the following conditions be met by the Applicant: submit revised plan, eliminate the easterly drive and follow the 3 to 1 lot ratio requirement. (J.S. Ex. "I").

On May 4, 2000, the Council voted 9-4 against the ordinance that would have approved Furlong's application. (L.F. 10; J.S. par. 40 and J.S. Ex. "Y").

On May 9, 2000, Furlong [2] filed its First Amended Petition. (L.F. 8). Count I alleged a cause of action for Mandamus, Count II alleged causes of action for taking under the U.S. and/or Missouri Constitutions and Count III alleged causes of action under 42 U.S.C. §1983 for violation of substantive due process and/or equal protection rights under the Fourteenth Amendment to the U.S. Constitution. (L.F. 8-14).

On September 11, 2000, the City filed its answer to the First Amended Petition. (L.F. 2, 35-39).

On October 19, November 3 and 15, 2000, and over the City's objection, the trial court conducted a trial *de novo* on the mandamus claim, receiving both testimony and exhibits. (L.F. 1-2, 40-41, Tr. p. 1-470; Tr. p. 609 l. 10-p. 613, l. 8).

On November 29, 2000, the trial court issued an Order in Mandamus finding that the Council's action in denying the preliminary plat was unlawful, unreasonable, arbitrary and capricious. (App. 1-2 [3]). The Council was ordered by the trial court to pass an ordinance approving Furlong's preliminary plat application, which it did. (App. 1-2).

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[2]Wendy's International, Inc. ("Wendy's") was the other relator-plaintiff in this case. (L.F. 8). On September 13, 2002, the trial court entered judgment in favor of the City against Wendy's on all claims. (L.F. 6). Wendy's did not appeal.

[3]Reference to Appendix attached to Appellant's Substitute Brief.

On September 23-25, 2002, the trial court conducted a bench trial on the remaining counts and claims[4]. (L.F. 42, Tr. p. 471-926).

Furlong offered evidence that the Council's denial of Furlong's application prevented it from obtaining the necessary building permits to proceed with the development of the entire parcel. (Tr. p.479, l. 1-p. 480, l. 3; p. 482-485; p. 834, l. 3-7; p. 914, l. 5-17). Richard Usher, the City's manager of building permits, testified that an approved preliminary plat application was not required in order to obtain building permits and commence construction. (Tr. p. 895-898).

Furlong's principal, Michael Furlong, testified the City issued a building permit for Furlong's carwash prior to the December 7, 1999 Commission proceeding. (Tr. p. 135, l. 5-15). Michael Furlong also testified he was in the process of constructing a car wash on the property prior to the submission of his preliminary plat application and that construction continued throughout the processing of the application. (Tr. p. 135, l. 5-15; Tr. p. 607, l. 1-4; p. 608, l. 15-19). The carwash was open for business as of November 3, 2000, which was prior to the mandamus order entered on November 29, 2000. (Tr. p. 135, L. 5-23; Tr. p. 588, L. 5-9).

On November 19, 2002, the trial court entered judgment in favor of the City on all remaining counts and claims except for Furlong's substantive due process claim contained in Count III. (App. 3-8). The trial court found that the Council's denial of the application was "truly irrational"

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[4] The trial court relied on the transcript of proceedings and exhibits from the mandamus trial in deciding the remaining claims. (Tr. p. 476, l. 13 - p. 477, l. 1; p. 539, l.13 - ps. 543, l. 7).

and awarded Furlong $224,871.00 in damages. (App. 3-8).

On July 25, 2003, the trial court entered a final judgment and order in which it awarded $148,435.20 in attorney fees and costs to Furlong. (L.F. 51-63).

On August 27, 2003, the City timely filed its notice of appeal. (L.F. 48).

On February 22, 2005, the Court of Appeals issued its order and opinion reversing the trial court's judgment. (Furlong's Application for Transfer). On March 29, 2005, the Court of Appeals denied Furlong's Motion for Rehearing and Application for Transfer. (Furlong's Application for Transfer). On May 31, 2005, this Court granted Furlong's Motion for Transfer.

IV. POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE IT EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW BY HEARING THE PROCEEDING DE NOVO IN THAT REVIEW OF A PLAT APPLICATION DENIAL IS LIMITED TO THE INFORMATION PRESENTED TO THE CITY COUNCIL.

State ex rel. Westside Dev., Co. Inc. v. Weatherby Lake, 935 S.W.2d 634 (Mo. App. 1996).

II. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT THE CITY COUNCIL'S DECISION WAS ARBITRARY OR CAPRICIOUS IN THAT THE INFORMATION THE CITY COUNCIL REVIEWED WAS SUFFICIENT TO SUPPORT THE CITY COUNCIL'S DECISION TO DENY THE PRELIMINARY

PLAT APPLICATION.

State ex rel. Westside Dev. Co., Inc. v. Weatherby Lake, 935 S.W.2d 634 (Mo. App. W.D. 1996).

III. THE TRIAL COURT'S GRANT OF JUDGMENT ON THE SUBSTANTIVE DUE PROCESS CLAIM WAS CLEARLY ERRONEOUS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CITY ACTED IN A CLEARLY IRRATIONAL MANNER WHEN ITS CITY COUNCIL DENIED FURLONG'S PRELIMINARY PLAT APPLICATION IN THAT THE TRIAL COURT ERRONEOUSLY DECLARED THE LAW AND IN THAT THE PLAT DID NOT COMPLY WITH THE CITY'S SUBDIVISION ORDINANCE AND THIS WAS A RATIONAL BASIS FOR THE CITY'S DENIAL AND IN THAT FURLONG USED THE PROCESS AVAILABLE AND THEREFORE WAS NOT DENIED DUE PROCESS.

Frison v. City of Pagedale, 897 S.W.2d 129 (Mo. App.1995).

IV. THE TRIAL COURT'S AWARD OF DAMAGES WAS CLEARLY ERRONEOUS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CITY PROXIMATELY CAUSED THE DAMAGES AWARDED TO FURLONG.

Valley Line Co. v. Ryan, 771 F.2d 366, 371 (8th Cir. 1985).

V. ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE IT EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW BY HEARING THE PROCEEDING DE NOVO IN THAT REVIEW OF A PLAT APPLICATION DENIAL IS LIMITED TO THE INFORMATION PRESENTED TO THE CITY COUNCIL.

STANDARD OF REVIEW

In a bench trial, Missouri Supreme Court Rule 73.01 has been held to mean that the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). In this case, the trial court erroneously applied the law.

THE TRIAL COURT ERRED BY CONDUCTING A TRIAL *DE NOVO* ON FURLONG'S MANDAMUS CLAIM.

The Western District Court of Appeals established the standard for a court's scope of review in a mandamus proceeding to compel the approval of a plat by a governing body in *State ex rel. Westside Dev. Co., Inc. v. Weatherby Lake,* 935 S.W.2d 634 (Mo. App. W.D. 1996). In *Weatherby Lake* at p. 640*,* the Court stated:

> When proceeding under the subdivision ordinance, the Commission and the Council are acting in an administrative capacity and not in a legislative capacity. *State ex rel Schaefer v. Cleveland,* 847 S.W.2d 867 (Mo. App. 1992). As such, when their decision resolves issues of fact, the reviewing court is not authorized to substitute its judgment for the judgment of the administrative body if such findings of fact are supported

by competent and substantial evidence. *State Bd. of Registration for the Healing Arts v. Masters,* 512 S.W.2d 150, 157 (Mo. App. 1974). If the decision of the Board involves an interpretation of application of the law, then those matters are within the independent judgment of the reviewing court and subject to correction where erroneous. . .

It is well established that the purpose of mandamus is to execute and not to adjudicate; it coerces performance of a duty already defined by law. *Williams v. Gammon,* 912 S.W.2d 80 (Mo. App. 1995); *Naugher v. Mallory*, 631 S.W.2d 370 (Mo. App. 1982). "A writ of mandamus is only appropriate when the respondent has a clear duty to perform a certain act." *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 920 (Mo. banc 1993). "The purpose of mandamus is to execute not to adjudicate -- it coerces performance of an already established duty." *State ex rel. Gladfelter v. Lewis*, 595 S.W.2d 788, 790 (Mo. App. 1980).

In this case, Furlong's application for a preliminary plat was denied by the City Council. Furlong contended in the trial court that the application on its face should have been approved. Furlong filed suit and sought relief via a writ of mandamus. At Furlong's request, the trial court heard extrinsic testimony and evidence based on the incorrect scope of review. The trial court did not limit its review to the application submitted by Furlong and information received by the City Council. The trial court's conducting a trial *de novo* to determine whether a writ in mandamus should issue was an erroneous application of the law, as set out in *Weatherby Lake*.

Based on the authority cited above, the proper method for relief via mandamus is for the trial court to review only the record and information that was before the City Council to determine whether Furlong had a clear legal right for approval of its application. In adjudicating Furlong's claim by receiving testimony and exhibits that had not been presented to the council, including expert testimony on

the compliance of the plat, the trial court acted outside of the scope of its authority to sit in mandamus. Under *Weatherby Lake,* and the other authority above, the trial court should have limited itself to the record before the City Council. As a matter of law, the trial court erred by considering extrinsic evidence.

The trial court erroneously applied the law when it conducted a trial *de novo* for the mandamus claim. Therefore**,** the writ of mandamus issued by the trial court should be vacated and judgment entered in favor of the City.

II. THE TRIAL COURT ERRED IN GRANTING A WRIT OF MANDAMUS BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT THE CITY COUNCIL'S DECISION WAS ARBITRARY OR CAPRICIOUS IN THAT THE INFORMATION THE CITY COUNCIL REVIEWED WAS SUFFICIENT TO SUPPORT THE CITY COUNCIL'S DECISION TO DENY THE PRELIMINARY PLAT APPLICATION.

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In a bench trial, Missouri Supreme Court Rule 73.01 has been held to mean that the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). In this case, the trial court erroneously applied the law.

THE TRIAL COURT ERRED BY FINDING THAT THE CITY COUNCIL'S DECISION WAS ARBITRARY AND CAPRICIOUS.

There was competent and substantial evidence before the Council which supported its decision not to approve the proposed preliminary plat on several grounds.

Because the land was zoned for commercial purposes, one of the subdivision requirements the proposed preliminary plat had to satisfy is set out in §66-130(b)(2), Code of Ordinances ("Subdivision Regulations"). That requirement is that the subdivider must satisfactorily demonstrate that the "[S]treet rights-of-way and pavement shall be adequate to accommodate the type and volume of traffic to be generated thereupon." The prefatory paragraph on §66-130(b) qualifies this standard by stating that this adequacy is to be determined taking into consideration the uses anticipated on the land to be subdivided, as well as other uses in the vicinity.

Additionally, §66-2(b)(7) of the subdivision Regulations requires the Council to determine when it is considering the approval of a preliminary plat the effect of the proposed subdivision of land on ". . . the circulation of traffic throughout the city, having particular regard to the avoidance of excessive congestion in the streets and highways and the provision of safe and convenient vehicular and pedestrian traffic movements appropriate to the various uses of land and buildings . . . ."

The City Council's Planning, Zoning and Economic Development Committee heard testimony from the subdivider of the anticipated uses for the property. There were three such uses: a carwash that was being constructed on proposed Lot 2 and a fast food restaurant on each of proposed Lots 1 and 3. From city staff and the December 7, 1999 staff report (Ex. I, Joint Stipulation), the P & Z Committee learned of the other land uses in the vicinity: another fast food restaurant, a bank, a gas/convenience store and an office building on the north side of Red Bridge Road to the east of the parcel; a three-story office building on the north side of Red Bridge Road to the west of the parcel; and the Red

Bridge Shopping Center across Red Bridge Road directly to the south. The committee heard about the potential impact on traffic.

§66-81(a)(2) of the Subdivision Regulations also requires that all subdivision plats comply with the City's "zoning ordinance and building . . . codes . . . ." §66-81(b) specifically provides that plat approval may be withheld if a proposed subdivision is not in conformity with any of the laws, rules and regulations listed in §66-81(a).

In the City's zoning ordinance (Exhibit D, Joint Stipulation), §80-140(b)(1)d.4 (on page CD80:58), it is required that, for a parcel to be used as a carwash, there must be sufficient space provided on the site for the stacking of a minimum of five cars per bay. The Committee was presented by the applicant with two diagrams showing stacking of cars for the eight bay carwash being constructed. One diagram clearly did not comply. The other diagram had the cars waiting for a bay backed into the proposed cross easement and behind the carwash where cars would exit. Given that the proposed cross easement was to also allow access into the other two proposed parcels and that a reasonable person could doubt that a stacking scheme that put cars waiting for a carwash bay behind the carwash where cars would be exiting from the bays.

§66-124(c)(2) of the Subdivision Regulations requires for the subdivision of large parcels that the ratio of the lot depth to the lot width generally not exceed 3:1. The depth and frontage width of proposed Lot 2 on the preliminary plat exceeds the 3:1 depth to width ratio and failed this requirement.

Because of concerns that proposed Lot 3 might not be large enough to satisfy the requirements in the zoning ordinances and the Building Code for parking and stacking of cars for a fast food restaurant which could

result in cars backing out into Red Bridge Road waiting to turn into the parcel at a point near the entrance to the Kentucky Fried Chicken, the easterly drive on proposed Lot 3 was recommended by staff to be eliminated from the preliminary plat. It was not. So, the Council properly denied approval of the preliminary plat that did not comply with this condition; a condition grounded in the standard set out in §66-2(b)(7) to make plat approval decisions so as to avoid excessive congestion in the streets and to provide for safe and convenient vehicular and pedestrian traffic movements.

At the trial court, Furlong stipulated that the deficiencies in the plat had been presented to the City Council. This Court should find from the record that was before the Council that there were sufficient rational reasons to deny Furlong's preliminary plat application. Therefore, the writ of mandamus issued by the trial court should be vacated and judgment entered in favor of the City.

III. THE TRIAL COURT'S GRANT OF JUDGMENT ON THE SUBSTANTIVE DUE PROCESS CLAIM WAS CLEARLY ERRONEOUS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CITY ACTED IN A CLEARLY IRRATIONAL MANNER WHEN ITS CITY COUNCIL DENIED FURLONG'S PRELIMINARY PLAT APPLICATION IN THAT THE TRIAL COURT ERRONEOUSLY DECLARED THE LAW AND IN THAT THE PLAT DID NOT COMPLY WITH THE CITY'S SUBDIVISION ORDINANCE AND THIS WAS A RATIONAL BASIS FOR THE CITY'S DENIAL AND IN THAT FURLONG USED THE PROCESS AVAILABLE AND THEREFORE WAS NOT DENIED DUE PROCESS.

STANDARD OF REVIEW

In a bench trial, Missouri Supreme Court Rule 73.01 has been held

to mean that the judgment of the trial court will be sustained unless there is not substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). In this case, the trial court erroneously declared the law, and there was not substantial evidence to support the judgment.

THERE IS NO CAUSE OF ACTION FOR MONEY DAMAGES UNDER THE SUBSTANTIVE DUE PROCESS CLAUSE FOR THE DENIAL OF A PRELIMINARY PLAT APPLICATION.

There are no reported appellate cases from Missouri or the Eighth Circuit applying Missouri law that hold a preliminary plat applicant whose application was initially denied and later approved can recover money damages under the substantive due process clause of the U.S. Constitution. It is the City's position that the trial court erroneously declared the law because there is no cause of action that allows an applicant to recover money damages based on the initial denial of a preliminary plat application and its later approval.

FURLONG FAILED TO PROVIDE SUBSTANTIAL EVIDENCE TO PROVE A SUBSTANTIVE DUE PROCESS CLAUSE CLAIM.

If this Court holds that Missouri will recognize such a cause of action, the trial court's order should be reversed because Furlong did not provide substantial evidence to support the judgment.

"In order to prevail on their §1983 claim plaintiffs must establish that they have been deprived of a federally protected right, privilege or immunity by persons acting under color of state law." *Littlefield v. City of Afton*, 785 F.2d 596, 600 (8th Cir. 1986).

To prevail on a substantive due process claim, plaintiff must first establish "a protected property interest to which the Fourteenth Amendment's due process protection applies." *Ellis v. City of Yankton*, 69 F.3d 915, 917 (8th Cir. 1995). "A protected property interest, which is a question of state law, is 'a legitimate claim to entitlement' . . . as opposed to a mere subjective expectancy." *Batra v. Board of Regents*, 79 F.3d 717, 720 (8th Cir. 1996), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "A claim to entitlement arises, for these purposes, when a statute or regulation places substantial limits on the government's exercise of its licensing discretion. Thus, the holder of a land use permit has a property interest if a state law or regulation limits the issuing authority's discretion to restrict or revoke the permit by requiring that the permit issue upon compliance with terms and conditions prescribed by statute or ordinance." *Littlefield v. City of Afton*, 785 F.2d 596, 602 (8th Cir. 1986). "Procedures alone do not create a substantive property right." *Stow v. Cochran*, 819 F.2d 864, 866 (8th Cir. 1987).

The following discussion was contained in *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir.1997):

> To prevail on a substantive due process claim, plaintiff must first establish "a protected property interest to which the Fourteenth Amendment's due process protection applies. A protected property interest, which is a question of state law, is a legitimate claim to entitlement . . . as opposed to a mere subjective expectancy. A claim to entitlement arises, for these purposes, when a statute or regulation places substantial limits on the government's exercise of its licensing discretion. Thus, the holder of a land use permit has a property interest if a state law or regulation limits the issuing authority's discretion to restrict or revoke the permit by requiring that the permit issue upon

compliance with terms and conditions prescribed by statute or ordinance. Procedures alone [do not] create a substantive property right. (Internal citations and quotations omitted)

The Court in *Bituminous Materials* held:

Moreover, even if BMI could prove a constitutionally protected property interest, we agree with the district court that BMI has failed to prove the second element of a substantive due process claim, that the Board's actions were 'truly irrational.' In *Chesterfield*, we took a restrictive view of when land use planning decisions by local government agencies violate an aggrieved party's substantive due process rights. Drawing on earlier opinions in *Lemke v. Cass County*, 846 F.2d 469, 471-73 (8th Cir. 1987) (en banc) (Arnold, J., concurring), and *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989, 74 L. Ed. 2d 385, 103 S. Ct. 345 (1982), we held that to sustain such a claim, plaintiff must prove that the government action in question is 'something more than . . . arbitrary, capricious, or in violation of state law'. *Id.* at p. 1070.

Finally, the Court in *Bituminous Materials* stated: "There is good reason for this judicial reluctance to intervene in such disputes. To allow the loser of each zoning decision, both those who seek a change and those who seek to block changes, to sue in federal court on bald allegations of arbitrariness would significantly burden both federal courts and local zoning decision makers. Thus, even allegations of bad faith enforcement of an invalid zoning ordinance do not, without more, state a substantive due process claim." (Internal citations and quotations omitted). *Id* at p. 1070.

Missouri Courts have held, "To assert a valid substantive due process claim, a Plaintiff "must establish that the government action

complained of is 'truly irrational,' that is, something more than ... arbitrary, capricious, or in violation of state law.” *Roy v. Missouri Dept. of Corrections,* 23 S.W.3d 738, 746 (Mo. App. W.D. 2000).

In *Frison v. City of Pagedale,* 897 S.W.2d 129 (Mo. App. E.D. 1995), the City of Pagedale refused to issue flea market licenses to the Plaintiffs, until directed by a court, and then the licenses were restricted to the indoors only. *Id.* at 132-133. The Plaintiffs in *Frison* alleged that the City's motivation for not issuing the licenses in the first place and then issuing them with restrictions was in retaliation for Jack Frison's cooperation with the F.B.I. during an investigation of city officials. *Id.* at 132. “Even a bad faith violation of state law does not rise to the level of a substantive due process violation.” *Frison v. City of Pagedale,* 897 S.W.2d 129, 132 (Mo. App. E.D. 1995) The Court in *Frison* held as a matter of law that Plaintiffs' allegations do not rise to the level of “truly irrational” actions on the part of the city and dismissed the substantive due process claim. “At best, Plaintiffs have pled a violation of state law.” *Id.* at 133.

The Eighth Circuit, relying on Missouri law, has also held that “Even a bad faith violation of state law does not rise to the level of a substantive due process violation.” *Chesterfield Dev. Corp. v. City of Chesterfield,* 963 F.2d 1102, 1105 (8th Cir.1992)). In *Chesterfield,* the City of Chesterfield enacted a comprehensive zoning plan and a zoning ordinance. *Id.* at 1103. The city failed to provide proper notice before adopting the plan and did not file it with the recorder of deeds. Accordingly, both of the enactments were invalid under state law. *Id.* Plaintiff filed suit, alleging among other things a substantive due process violation. The court in *Chesterfield* held that this state law error

by the city, no matter how fundamental, could not in and of itself create a federal due process claim. *Id.* at 1105.

Moreover, all that is required is that there be some, even any, rational basis for the City's decision. "The appellants question whether the city's proffered rationale is the real reason the city passed the ordinance. As long as a rational basis exists, however, it need not be the real reason for the governmental action to satisfy substantive due process." *Williamson v. Lee Optical Co*., 348 U.S. 483, 490 (1955); *Scott v. Sioux City*,736 F.2d 1207, 1217 (8th Cir. 1984). "The standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

This Honorable Court should hold that there was no substantial evidence to support the trial court's judgment. Even assuming that a claim exists for preliminary plat applicants such as Furlong, under these circumstances, the evidence produced during the trial of this case falls woefully short of meeting the burden set forth in *Bituminous Cole, supra*. In this case, Furlong failed to provide substantial evidence that the Council's decision to deny the plat application ordinance was irrational.

The evidence clearly established that the City had rational reasons for denying Furlong's application. The City Council's Planning Zoning and Economic Development Committee reviewed Furlong's preliminary plat ordinance request. On March 1, 8, 15 and 22, the Committee conducted meetings on Furlong's ordinance request. The neighbors opposing approval of the application because of concerns of increased noise and traffic again voiced their opposition. In reviewing the request, the Committee was made aware of the staff report and the

Commission's 6-0 vote against the application. From the staff report, the Committee was aware of Furlong's failure to eliminate the easterly drive, the fact that one lot on the plat exceeded the 3 to 1 lot ratio, and Furlong's failure to submit a revised plat. The Fact Sheet stated that the application was to allow for the subdivision of 2.76 acres into three (3) lots, one containing a car wash and the others intended for restaurants. The staff report stated what was already there, a Kentucky Fried Chicken/Taco Bell, Red Bridge Shopping Center to the South, Building of an eight bay carwash had commenced, Amoco gas station and Somerset Bank. The Center Planning & Development Council opposed the application because the proposed uses were too intensive for site, and there would be increased traffic and noise. [5]

Prior to the full Council vote, the information presented to the Commission and the Council Committee was made known to the entire City Council by way of the Ordinance Fact Sheet.

Based on the above facts, there was not substantial evidence to support the trial court's judgment that the Council acted irrationally when it denied Furlong's application because there was ample evidence that the Council had supported rational justification for its denial.

FURLONG UTILIZED THE PROCESS AVAILABLE TO APPROVE ITS DENIED APPLICATION

"Unlike its eponym, substantive due process refers not to

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[5] See Section II of this brief for a more detailed discussion of the plat's noncompliance with the City subdivision regulations.

process at all, but to substantive rights. To make out a substantive due process claim, Walker must show that the law violated one of his fundamental rights, which no amount of process could repair." *Walker v. Kansas City*, 911 F.2d 80, 93 (8th Cir. 1990).

In this case, the denial by the Council of Furlong's application is the basis for Furlong's substantive due process claim. Furlong filed an action for a court order directing the Council to approve Furlong's application. Furlong was heard and the trial court ordered the Council to pass an ordinance approving Furlong's preliminary plat application, which it did. Accordingly, there was no substantial evidence to support a judgment for a substantive due process claim because Furlong had a process available to repair the alleged wrong and in fact utilized it.

The trial court erroneously applied the law when it ruled in Furlong's favor on the substantive due process claim. Therefore, the judgment issued by the trial court should be vacated and judgment entered in favor of the City.

IV. THE TRIAL COURT'S AWARD OF DAMAGES WAS CLEARLY ERRONEOUS BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE CITY PROXIMATELY CAUSED THE DAMAGES AWARDED TO FURLONG.

STANDARD OF REVIEW

In a bench trial, Missouri Supreme Court Rule 73.01 has been held to mean that the judgment of the trial court will be sustained unless there is not substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). In this case, the trial court erroneously awarded damages,

and there was not substantial evidence to support the judgment.

DAMAGES SHOULD NOT HAVE BEEN AWARDED.

Damages under 42 U.S.C. §1983 must be proven to have been proximately caused by the actions of the defendant. *Valley Line Co. v. Ryan,* 771 F.2d 366, 371 (8th Cir. 1985).

Furlong's main theory for relief is that the Council's denial of Furlong's application prevented it from obtaining the necessary building permits to proceed with the development of the entire parcel. Furlong's principal, Michael Furlong, testified the City issued a building permit for Furlong's carwash prior to the December 7, 1999 City Planning Commission hearing. Michael Furlong also testified he was in the process of constructing a car wash on the property prior to the submission of his preliminary plat application and that construction continued throughout the processing of the application. In fact, the carwash was open for business as of November 3, 2000, which was prior to the mandamus order entered on November 29, 2000. Representatives of Furlong, Wendy's and Furlong's economist testified that they assumed that the City would not issue building permits until the preliminary plat application was approved by the Council. Richard Usher, the City's manager of building permits, testified that an approved preliminary plat application was not required in order to obtain building permits and commence construction. As such, there was not substantial evidence to support the judgment that the Council's denial of Furlong's preliminary plat application proximately caused damage to Furlong. It was the Plaintiff's incorrect assumptions that caused injury to Furlong.

Additionally, any "delay" damages Furlong was awarded was caused by Furlong's own inaction. On May 4, 2000, the Council denied

Furlong's application. On May 9, 2000, Furlong filed its Amended Petition seeking review of the Council's denial. Furlong elected to proceed via a trial *de novo*, conduct discovery and waited until October of 2000 to commence its hearing. Had Furlong proceeded on the record made before the Council as was appropriate, and not delayed matters by requesting a trial *de novo*, it would not have suffered any of the "delay" damages claimed as a result of the preliminary plat application being denied on May 4, 2000 and then ordered approved by the trial court on November 29, 2000.

As such, there was no substantial evidence to support a judgment for a substantive due process claim because any "delay" damages were caused by Furlong's inaction, not anything done by the Council.

The trial court erroneously applied the law when it awarded damages on the substantive due process claim. Therefore, the judgment issued by the trial court should be vacated and judgment entered in favor of the City.

VI. CONCLUSION

For the foregoing reasons, Appellant City of Kansas City, Missouri respectfully requests that this Court reverse and vacate the judgment of the Circuit Court entered in favor of Respondent Furlong Companies, Inc.

Respectfully submitted,

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APPELLANT'S CERTIFICATE OF COMPLIANCE

Douglas McMillan, attorney for Appellant City of Kansas City, Missouri, hereby certifies that he is in compliance with Rule 55.03, that this Brief is in compliance with the limitations contained in Rule 84.06(b), that the Brief contains 6,661 words that the Brief was prepared using WordPerfect 9.0 in 13 point font, and in Times New Roman. Pursuant to Rule 84.06(g), the accompanying disk has been scanned for viruses and it is virus-free.

_____
Douglas McMillan

CERTIFICATE OF SERVICE

A copy of Appellant's Substitute Brief and diskette were served via hand delivery this 8th day of July, 2005, to:

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APPENDIX

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